Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, *et al*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner

QUESTIONS PRESENTED

I. Whether Petitioner, employed as a deputy sheriff with a public agency (Ada County), has a statutory right of action under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216(b), from the events stemming from the employer's violations of § 211(c) and § 207(k), FLSA, and Petitioner's refusal to resign her employment when threatened with retaliatory criminal prosecution, without probable cause.

II. Whether Ada County was required to provide Petitioner due process in a "pre"-termination *Loudermill*[1] hearing **prior to** termination of that classified employment, when Petitioner's "hearing" occurred **after** termination from employment; whether the decision of an elected official (Sheriff) to terminate Petitioner can stand as the "final" act, contrary to Petitioner's vested rights to engage due process protection under the County Merit System, the Federal Due Process Clause, existing Federal and Idaho law; and, whether Petitioner has a due process right under the 14th Amendment of the U. S. Constitution, and Article I, § 13 of the Idaho Constitution, to engage in an agency review process and judicial proceedings thereafter to address the lack of "good cause" when terminating her classified employment.

III. Whether the former provisions of § 1-7G-1 through § 1-7G-3, Ada County Code, and the provisions contained in the County Commissioners' March 21, 2006 amendments to §1-7G-1 through § 1-7G-3 (Ordinance No. 612), Ada County Code, comply with *Idaho Code*, § 31-714, the due process provisions of the Idaho Constitution and the Due Process Clause of the U.S. Constitution, or be regarded as repugnant to law for denying a classified employee the right to

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[1] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985).

participate in procedural due process, in light of the Idaho Supreme decision declaring Ada County Code, § 1-7G-3(O) "infirm" and "conflicts with the general laws of this State".

IV. Whether Ada County committed an intentional concealment and perversion of truth (fraud) by failing to disclose to Idaho courts how Ada County Sheriff had misclassified Jail Technicians as exempt under 29 U.S.C. § 207(k) for many years, beginning 1993-1995 to the date beyond Petitioner's duration of employment, and whether such intentional failure to disclose FLSA violations, was undertaken to avoid County liability and relief to Petitioner.

V. Whether the Idaho Supreme Court suppressed due process when denying Petitions For Writ of Certiorari and Mandamus, and engaged in a process of sidestepping issues presented by Petitioner, entering conclusions of law contrary to existing federal authority, and pursuing what appears a "result oriented" focus to insulate the agency from liability.

VI. Whether the cause of action in Petitioner's Title 42 U.S.C. § 1983 action begins to accrue upon the occurrence of the "last overt act" for purposes of applying the statute of limitations for conduct undertaken by Ada County.

LIST OF ALL PARTIES

STACY A. GIBSON[2],

Petitioner,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Respondents.

STACY A. GIBSON[3],

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho, and the ADA COUNTY SHERIFF'S OFFICE,

Respondents.

[2] Idaho Supreme Court Docket No. 29694
[3] Idaho Supreme Court Docket No. 30976

List Of All Parties

ADA COUNTY[4],

Respondent,

v.

STACY A. GIBSON,

Petitioner.

[4] Idaho Supreme Court Docket No. 31553

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OPINION BELOW

The Idaho Supreme Court Opinion is reported in *Gibson v. Ada County, Idaho et al*, ___ Idaho ___, 133 P.3d 1211 (2006)(*Appendix 1*). Orders were entered Denying Petition For Rehearing (*Appendix 2*), Petitions For Writ of Certiorari (*Appendix 3*) and Mandamus (*Appendix 26, 27 & 28*).

JURISDICTION

The subject Opinion was filed February 9, 2006 (*Appendix 1*). In the absence of statutory authorization for judicial review of Petitioner's termination, Ms. Gibson filed a Petition For Writ Of Certiorari (*Appendix 4 & 5*), requesting the Idaho Supreme Court review the actions of Ada County, a political subdivision, acting through its Commissioners, Sheriff, Legal Advisor, and Personnel Hearing Officer, to determine whether their termination was in excess of the agency's jurisdiction, and pursued in absence of constitutional authority. That Petition was denied (*Appendix 3*). Petition For Rehearing of the February 9th Opinion was denied May 9, 2006 (*Appendix 2*); Remittitur issued (*Appendix 6*), and Awarded Costs and Fees May 12, 2006 (*Appendix 7*).

The lower courts then entered Orders awarding Attorney Fees and Costs (*Appendix 8, 9, 10, 11, 12 & 13*).

Pursuant to Article I, § 3, Idaho State Constitution, Idaho is an inseparable part of the Union, and the U.S. Constitution is the supreme law of the land, granting this Court jurisdiction over Constitutional rights. This Court has jurisdiction pursuant to U.S. Supreme Court Rule 10 (b), as Idaho's Supreme Court denied Petitioner protection afforded by the Statutes of the United States, deciding federal questions that conflict with prior rulings, and contrary to U.S. Courts Of Appeals, and denied Petitioner rights guaranteed under the U.S. Constitution. This Court has jurisdiction

under U.S. Supreme Court Rule 10 (c), as the Idaho Court incorrectly decided questions of federal law that have not been, but should be, settled by this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1257, to review Ada County Ordinance (authorized by § 31-714, *Idaho Code*) now declared "infirm" by the Idaho Supreme Court. The County's Ordinance is repugnant to the U.S. Constitution, as it effectively denies a due process procedural format to exercise a right of protection.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. U.S. Constitution, 14th Amendment:

   § 1 ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Idaho Constitution, Article I, § 1:

   § 1 Inalienable rights of man. – All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety.

3. Idaho Constitution, Article I, § 3:

   § 3 State inseparable part of union. – The state of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land.

4. Idaho Constitution, Article 18, § 6:

   § 6 County officers. – .....The sheriff, ... shall be empowered by the county commissioners to appoint such deputies and clerical assistants as the business of their

office may require.....". (*See Appendix D* for complete text).

5. *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq.*
6. *Idaho Code*, § 31-714:

   § 31-714. Ordinances — penalties. – The board of county commissioners may pass all ordinances and rules and make all regulations, not repugnant to law....". (*See Appendix E* for complete text).
7. *Idaho Code*, § 67-2345 (*Appendix F*).
8. *Ada County Code*, § 1-7-1 – § 1-7L-10 (*Appendix A*).
9. *Ada County Code*, § 1-14-1 – § 1-14-8 (*Appendix B*).
10. *Ada County Code*, Ordinance No. 612 (*Appendix C*).
11. *Idaho Rule of Civil Procedure* 84(a) (*Appendix H*).

INTRODUCTORY STATEMENT OF THE CASE

The dispute between Petitioner and Ada County, Idaho, began when Ada County Sheriff, Vaughn Killeen, caused Petitioner, a permanent status Jail Technician employee, to suffer extensive interrogation on July 20, 1999, with subsequent termination of her classified employment without proper cause, and ongoing retaliation and discrimination, giving rise to a series of litigation proceedings. Three cases before the Idaho Supreme Court were consolidated for disposition (Docket Nos. 29694, 30976 and 31553), from which this Petition is sought.

The background of historical events of Petitioner's employment began in 1997, when Petitioner sought a career with law enforcement, and became employed with the Sheriff July 10, 1997. All compensation from said agency is controlled by Chapter 4.00, Sheriff's Policy Manual, Ada County Code (hereafter referred to as A.C.C.), § 1-7C-1 *et seq.* (*Appendix A*, p. 316a-326a), and regulated by the *Fair Labor Standards* Act (FLSA), Title 29 U.S.C., § 201 *et seq.*

In December, 1997, Ms. Gibson received a copy of a memorandum (*Appendix 57*) regarding overtime accrual and the 48 hour workweek rather than a 40 hour workweek from her supervisor. The Sheriff had long been reducing overtime compensation since *circa* 1993. The Legal Advisor had finally acknowledged staff members were not "law enforcement personnel", and did not qualify as exempt under § 207(k), FLSA for overtime calculations. Despite that acknowledgement, the Sheriff's practice of wrongfully using this "7k exemption" continued, and perpetuated throughout the entire duration of Ms. Gibson's employment, suffering errors for overtime wage miscalculations from the practice he started back in 1993-1995 era.

Pursuant to County Personnel System (Merit System), § 1-7E-2A, A.C.C. (*Appendix A*, p. 335a), Ms. Gibson received permanent classified employment status July 1, 1998, vesting rights under the Personnel System, and Due Process Clause.

Ms. Gibson always observed pay errors in the monthly pay vouchers required to be signed before Payroll would disburse earned wages. Ms. Gibson initially contacted Payroll and informed them. Payroll said error(s) would be corrected by them, but if you refuse to sign any voucher on account of error(s), no wage could be disbursed, as the system **required** a signed voucher to authorize pay, for the pay period, regardless of errors. Ms. Gibson learned to accept the errors, and believed Payroll would pay the wage owed her. A full text of the pay voucher used at the relevant time is in *Appendix 1*, p. 3a & *Appendix 38*, p. 219a.

Ms. Gibson was promoted and transferred to the main facility October 16, 1998, where she pursued her career, received overtime assignments, and completed 204 hours of course study by June 17, 1999.

Before her transfer, her gross monthly wage was $1,500.00, directly deposited by Payroll into a joint checking account with her husband. She never saw nor ever endorsed wage checks, as

it was processed under the County's automatic Direct Deposit Program.

By November, 1998, Payroll was committing more errors than just the "7k" error in wage accounting (*Appendix 56*). Firstly, instead of entering Ms. Gibson's new wage of $1,575.00 per month from the promotion, Payroll unexplainably entered $1,550.00 per month. Secondly, the erroneous § 207(k) classification was continuing and thirdly, Payroll programmed the computer system to pay Ms. Gibson one-half wage for her first position (Records Technician) for October 1-15, 1998, and one-half the new wage (though short) for the promoted position (Jail Technician) for October 16-31, 1998. Payroll put that "mixed" wage information into a "tickler file" apparently intending to calculate her wage differently after October, but Payroll failed to remove the reference, and made matters worse by disbursing full payment on both positions. *See Appendix 74*, p. 538a-539a, *Appendix 75*, p. 544a.

One figure, $3,050.00, was appearing on vouchers, but the voucher was a Payroll authorization, not a Payroll accounting statement. This miscalculation continued for eight (8) months (November, 1998 through June, 1999), and went undetected by Payroll (*Appendix 74 & 75*), and unknown to Petitioner or her husband. Payroll's negligent conduct caused the claimed overpayment deposit of $8,528.89.

Payroll claimed that amount (*Appendix 65, 66 & 68*). Ms. Gibson reconciled the accounting based on what she calculated they owed (*Appendix 73*). *See also Appendix 76.*

Ms. Gibson had ceased questioning the voucher entries because of what Payroll told her. She never saw or endorsed a check; had no personal involvement with any account register; never opened bank statements nor tried to balance the account. Her husband's work, selling farm equipment, resulted in deposits and withdrawals to the account, and he left the accounting such that it might be addressed if an overdraft

occurred. He withdrew funds regularly through ATM machines to transact cash expenditures while on sales' campaigns, and made deposits of his earned commissions into the account that ranged widely each month.

The County's failure to keep and maintain accurate wage and benefit records under FLSA caused the errors, including misuse of § 207(k), clear back to 1993[5]. *See* discovery responses in *Knickerbocker, et al. v. Ada County, Idaho*, Case No. CV 04-288-S-BLW, U.S. District Court, District of Idaho, *Appendix 59, 60, 61, 62, 63 & 64.*

The County's non-conforming record-keeping system caused FLSA violations (§ 211(c)), with underpayment – overpayment of regular wage, with retention of accrued overtime wages (§ 207(k) exemption), causing inaccurate deposits to be processed under the Direct Deposit Program.

Initial discovery began July 19, 1999, as Payroll determined overtime wages were due a group of employees, but not the § 207(k) violation. Payroll relayed a facsimile transmission (*Appendix 56*) to the Sheriff's Budget Director, identifying nine (9) employees thought "shorted" overtime wage, from October 1998 through June 1999 in a grant fund category. Ms. Gibson was listed among those employees (*Appendix 56, p. 270a*). When the Director reviewed the list, she still believed Ms. Gibson was **underpaid**, but that list was intended to address grant funds, and Ms. Gibson was not receiving grant funds. The Director was "working on a **problem** with a grant" (Emphasis added). (*Appendix 74*, p. 535a).

With the July 19th discovery, further issues of payments were discovered in Payroll, and that unleashed the

---

[5] Further discussion concerning Ada County's recognized misclassification of Jail Technicians being "exempt under 29 U.S.C. § 207(k)" was revealed to be sometime between "1993 to 1995", and the County's concealment of this information can be found on pages 24 & 25 of this Petition.

confrontation that began the afternoon of July 20, 1999. Ms. Gibson was on medical leave, at home, when a Sheriff detective called and requested she come to the Office. Ms. Gibson came, thinking she was selected for another work assignment in light of her special course study. These detectives, for two and one-half (2 ½) hours, gruesomely interrogated Ms. Gibson over the wage errors, and contrary to Sheriff's policy (*Appendix 77 & 78*), threatened her, using intrusive criminal techniques, calling her a thief, a liar, claimed she collaborated to cause overpayments deposited into the account; threatened her with criminal prosecution for grand theft, with incarceration, loss of her job, and the destruction of her career. Ms. Gibson was crushed and devastated by the false accusations, as these trained interrogationists pummeled their threats one after another. She had done none of what they were accusing her, and perceived herself "framed" over the County's errors.

These detectives **knew** Ms. Gibson had no involvement, as it was a direct deposit program; Ms. Gibson told them payroll vouchers had always been wrong; Payroll said they would correct pay errors, and it was not her responsibility. Ms. Gibson said the County could take her accrued comp, overtime, holiday and vacation time to offset confirmed overpayments. The County could also debit under the Direct Deposit Program (*Appendix 79*). She complained about the entire proceeding, their threats, the accounting errors, FLSA record-keeping violations, and asked for reconciliation, if pay reduction was necessary.

When Ms. Gibson arrived home, she was so overwhelmed, her husband contacted Dr. Stephen E. Spencer, M.D., who agreed to see her July 23, 1999. She was diagnosed with acute depression (*Appendix 50 & 54*). Ms. Gibson believed she must secure an attorney to protect her career.

By July 28, 1999, Ms. Gibson had counsel, who received a call from the Sheriff's Legal Advisor, stating the Sheriff wanted Ms. Gibson terminated immediately, and if she would not resign, the County would process felony charges against her for grand theft, and then fire her as well.

Ms. Gibson's attitude over her innocence was resolute; she would not accept blame for the County's flawed wage and benefit record-keeping violations; she would not resign her career, and not allow her job be stolen and wanted these issues in a due process hearing. With no possibility of resignation, Sheriff Killeen served Ms. Gibson his Notice of Intent to Impose Discipline (*Appendix 55*), stating it was his intent to terminate her employment because he believed she violated § 1-7G-3A(5), A.C.C. (*Appendix A*, p. 347a) and § 1-7G-3A(20) (*Appendix A*, p. 349a) and § 9.04 of the Sheriff's Policy Manual.

Sheriff Killeen had a determined attitude to terminate her, as he claimed Ms. Gibson was responsible for the payroll errors because she signed the vouchers, regardless of the County's FLSA violations.

As provided in § 1-7G-3C, County Personnel System (*Appendix A*, p. 351a), Ms. Gibson appealed the Sheriff's intent to terminate; denied any violation of the Personnel System, the Sheriff's Policy Manual or the Statutes of Idaho; that no basis existed to terminate, nor probable cause to prosecute, and requested a "hearing", authorized under § 1-7G-3D, County Personnel System (*Appendix A*, p. 352a).

Dr. Spencer notified the Sheriff Ms. Gibson's state had not improved to participate in confrontational hearings (*Appendix 47, 50 & 54*).

The Legal Advisor acknowledged Ms. Gibson's right to a *Loudermill* due process hearing, acknowledged awareness of Ms. Gibson's medical condition, acknowledged Ms. Gibson was overpaid **in error**, and advised Ms. Gibson **would receive wages owed to her** (*See Appendix 52*).

After Ms. Gibson served her request for a *Loudermill* hearing, the Sheriff's attitude intensified, and continued retaliation with threat of prosecution.

The Sheriff had Greg H. Bower, Ada County Prosecutor, send a letter to John Christensen, Chief Criminal Prosecutor, Canyon County, Idaho, stating he had **authorization** "to file charges..." *(Appendix 53)*. Such conduct was not authorized by *Idaho Code* §31-2603(a) (*Appendix G*); that letter carried forward the Sheriff's threat to frighten Ms. Gibson to resign. This conduct was malicious and retaliatory, pursued to get Ms. Gibson to relinquish a property right. Mr. Christensen announced criminal charges were "**inappropriate**" (*Appendix 51*).

Because of this continuing threat, Dr. Spencer diagnosed acute depression and situational distress (*Appendix 47 &50*).

On August 24, 1999, this Legal Advisor placed Ms. Gibson on administrative leave, **without** pay, canceled medical benefits (*Appendix 48*), and ignored efforts of Ms. Gibson, who would agree to temporary leave if insurance benefits continued (*Appendix 49*). This leave was taken in contradiction of § 1-7G-3B(5), A.C.C. (*Appendix A*, p. 350a-351a), a provision uniquely specific to paid leave.

On October 5, 1999, the Sheriff "**ordered**" Ms. Gibson diagnosed by the County Physician, Dr. Charles Steuart. Ms. Gibson and her husband did go as "**ordered**", and diagnosed by Dr. Steuart, who confirmed trauma diagnosed by Dr. Spencer.

Her medical condition was communicated to the Sheriff (*Appendix 47, 50 &54*), but on December 27, 1999, the Sheriff terminated her (*Appendix 46*) without any pre-termination hearing as required by § 1-7G-3D, A.C.C. (*Appendix A*, p. 352a) and *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985).

Ms. Gibson appealed the decision pursuant to § 1-7G-3L (*Appendix A*, p. 355a-357a), and requested a hearing. Ms.

Gibson gave notice of the wages she was entitled; asserted her FLSA rights; denied any violation, and notified Sheriff Killeen her voucher even for August 1999 was in error like all others. Legal counsel for Ada County sent correspondence about the voucher (*Appendix 45*). The historic practice had always been unless the voucher was signed there would be no pay. Ada County refused to compensate Ms. Gibson for which she was entitled. The Sheriff rejected pay reduction as authorized by § 1-7C-6B, A.C.C. (*Appendix A*, p. 320a-321a).

Through discovery (*Appendix A*, p. 355a-357a, Ms. Gibson attempted to secure evidence of her termination, and sought information relating to the wage record-keeping, and how the departments created errors and overpayments. The Ada County Personnel Hearing Officer denied Ms. Gibson access to that relevant information.

Dr. Spencer notified the State Board of Medicine the distorted information and conduct of County officials, including their destruction of Dr. Steuart's medical records created October 5, 1999 (*Appendix 44*).

The County acknowledged Ms. Gibson was owed **some** compensation and the Sheriff authorized some limited wages(*Appendix 68, Exhibit A*, p. 458a).

Ultimately, Ms. Gibson was diagnosed as having sustained a severe Post-Traumatic Stress Disorder (PTSD) (*Appendix 14*).

STATEMENT OF FACTS, DOCKET NO. 30976 – WRONGFUL TERMINATION AND DENIAL OF DUE PROCESS

The hearing Ms. Gibson received before the Ada County Personnel Hearing Officer, was held January 25th and 26th, 2000. On February 15, 2000, the Officer sustained the termination. That decision was appealed to the district court from instructions in § 1-7G-3O, A.C.C. (*Appendix A*, p. 358a).

The court sustained the termination. Appeal was taken to the Idaho Supreme Court, Docket No. 27605, and on May 28, 2003, their decision in *Gibson v. Ada County Sheriff's Department*, 139 Idaho 5, 72 P.3d 845 (2003) (*Appendix 38*), vacated the judgment and ordered the matter dismissed, without prejudice, and therein stated:

> "Notably, had Gibson appealed the county personnel hearing officer's decision to the Ada County Board of Commissioners (board), the decision would be an appropriate subject for judicial review and the IAPA [*Idaho Administrative Procedures Act*] standard of review would apply. I.C. § 31-1506(1). Without action of the board, however, the judicial review provisions of I.C. § 31-1506(1) are inapplicable" (*Appendix 38*, p. 224a).
>
> "ACC § 1-7G-3 (o) is not a "statute" within the meaning of (I.R.C.P.) 84 [Idaho Rule of Civil Procedure] (*Appendix H*), and thus cannot authorize judicial review. Because ACC § 1-7G-3 (o) is not a statute, yet it attempts to authorize judicial review of a personnel hearing officer's decision, it conflicts with I.R.C.P. 84 and is, therefore, infirm" (*Appendix 38*, p. 225a).
>
> "The ACSD [Ada County Sheriff's Department] has not prevailed on the merits in this matter. In fact, it is the infirm appeal provision of A.C.C. § 1-7G-3 (o), incorrectly instructing Gibson to appeal the decision of the county personnel hearing officer to the district court, which has prevented this Court from addressing the merits of this matter. As a result, the matter is dismissed *without prejudice* and the ACSD is not a prevailing party..." (Emphasis added). (*Appendix 38*, p. 227a).

From that Decision, Ms. Gibson submitted her Petition June 4, 2003 to the County Commissioners, requesting hearing and review of her termination. On July 2, 2003, Ada County denied Ms. Gibson a hearing (*Appendix 37*) and stated:

> "Thus, this Board is without legal authority to review Sheriff Killeen's termination of Ms. Gibson's employment with the Ada County Sheriff's Office. *See, Barth v. Canyon County*, 128 Idaho 707 (1996)", and
>
> "The Idaho Supreme Court decision in *Gibson v. Ada County Sheriff's Department*, Docket No. 27605, mentions an appeal of the Personnel Hearing Officer decision to the Board of County Commissioners. However, this would only apply in the instance of an employee under the Board of County Commissioners, rather than under a different elected official".

Not only was hearing required from *Gibson v. Ada County Sheriff's Department*, (*Appendix 38*), but the County's ordinance had been changed 20 years before to hold an elected official's decision was no longer final.

Ada County's ordinance-evolution process began with Ordinance No. 110, December 10, 1980, because Public Law 96-170 was enacted December 29, 1979 (involving Title 42, U.S.C. § 1983). That created modifications to federal legislation on constitutional and statutory rights. The change was designed to protect employees. That was Ada County's attempt to alleviate "finality" of termination imposed by an elected official, and correct denials of due process, under color of law. Specific historic details are found in *Appendix 24*.

Ms. Gibson requested the County reconsider, as a hearing is **authorized** by Chapter 14 (§ 1-14-1 through § 1-14-8), A.C.C. (*Appendix B*), and § 67-2345(1)(b), *Idaho Code* (*Appendix F*). No response was forthcoming. Ms. Gibson filed Petition for **Judicial Review** with the court to address the denial of her procedural right.

Ms. Gibson submitted motion requesting remand to the Commissioners, requiring an agency record, with evidence and a **final decision and order**. The lower court entered an Order (*Appendix 29*), that directed the County transmit the

entire record (*Appendix 29*, p. 186a-187a). The County transmitted no record (*Appendix 37*). The lower court never addressed the deficiency of a record. *See* Rule 84(n), I.R.C.P.; § 67-5275, § 67-5276 and § 67-5277, *Idaho Code*.

The lower court entered an Interlocutory Order Denying Ms. Gibson's Petition for Judicial Review (*Appendix 23*), but granted thirty (30) days to make common law claims (*Appendix 23*, p. 148a). Ms. Gibson filed a Petition and Amended Petition for Permissive Appeal to the Idaho Supreme Court, who denied the petition, mistakenly stating it was "dismissed, as it is from a **final order** and is not timely" (*Appendix 21*). It was not a final order, and later recognized as interlocutory by the courts.

Judge McKee recused himself, and Judge Joel D. Horton, assigned (*Appendix 22*). A "final order" was entered, from which an appeal was taken to the Idaho Supreme Court under Docket No. 30976 (*Appendix 20*). Relief was denied.

STATEMENT OF FACTS, DOCKET NO. 31553 – DENIAL OF STATUTORY RIGHT OF ACTION, *FAIR LABOR STANDARDS ACT*, 29 U.S.C. § 216(b)

Ms. Gibson demanded wages she was entitled (*Appendix 43*). No disbursement was forthcoming. Ms. Gibson contacted Idaho Department of Labor to collect those wages. The Director, advised he had no authority to investigate claims against public agencies, and Ms. Gibson must seek recovery under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. (*Appendix 42*).

Before Petitioner filed her civil rights suit in Docket No. 29694, Ada County filed suit alleging "mistaken receipt of monies" and requested $8,528.89.

Ms. Gibson filed her answer and counterclaim, providing facts surrounding her employment, rights, protection, and immunities under the County Merit System, § 1-7-1 through § 1-7L-10, A.C.C. (*Appendix A*), and the federal protection

afforded by FLSA in her contract, and "**right of action**" under FLSA, pursuant to the statutory scheme contained in § 1-7C-1, A.C.C. (*Appendix A*, p. 316a) and under federal law.

The lower court denied Ms. Gibson's motion to dismiss the complaint (*Appendix 19 & 36*), and denied Ms. Gibson her right to amend her counterclaim. The effect allowed the County to escape judicial enforcement of statutory and constitutional rights, and allow the County escape imposition of sanctions (liquidated damages) mandated under FLSA for wage and record-keeping violations, and serve to create a sanctuary to insulate it from the wrongful termination, and ongoing violations of federal law (FLSA). It denied Ms. Gibson her **statutory right to a cause of action** under FLSA § 216(b).

Ms. Gibson filed motion to reconsider, was denied, and Ms. Gibson filed motion for permissive appeal to the Idaho Supreme Court (*Appendix 31 & 32*), and demonstrated the manner by which federal courts ruled on employment rights, including FLSA cannot be construed in a narrow manner; the employer is responsible for "knowledge" and "management" of FLSA which compels it make, keep and preserve **accurate** employee wage records; the employer cannot transfer responsibility to the employee; the employer is statutorily subject to all restrictions, ramifications and sanctions provided in FLSA, and the employee has a "right of action" pursuant to § 216(b), FLSA (*Appendix 31*, p. 194a-199a & *Appendix 32*, p. 203a.

The district court withdrew its Order (*Appendix 25 & 30*), and allowed Ms. Gibson file an amended counterclaim.

Petitioner filed the amended counterclaim (*Appendix 73*), alleging the violations of FLSA, including § 211(c) (record-keeping), § 207(k) (misclassification of overtime), and §215(a)(3) (discrimination and retaliation).

The court dismissed Ms. Gibson's claim (*Appendix 19*) and the County moved for summary judgment, supported by

affidavit (*Appendix 68*), attesting Ms. Gibson was mistakenly paid $8,528.89 between October 1998 and June 1999. Ms. Gibson submitted her affidavit (Appendix 67) showing the County's lack of true reconciliation of wages prior to any "mistaken receipt of funds" and the wrongful "leave" issue, and that only after a full reconciliation (due to 211(c) and 207(k) violations), could the court address an accounting.

The County submitted supplemental affidavits (*Appendix 65 & 66*), discussing again **only** wages paid, and how $8,528.89 was calculated (*Appendix 65, 66 & 67*). The County avoided the issue of wages **owed** Ms. Gibson or willful § 207(k) misclassification, or the wrongful leave status.

Ms. Gibson sought permissive appeal to the Idaho Supreme Court (*Appendix 17 & 18*); the district court granted judgment against Ms. Gibson (*Appendix 15 & 16*), from which the appeal was taken to the Idaho Supreme Court under Docket No. 31553, and relief was denied.

STATEMENT OF FACTS, DOCKET NO. 29694 – VIOLATION OF CIVIL RIGHTS, 42 U.S.C. § 1983

Petitioner initiated a Title 42 action on July 19, 2002 because Ada County officials, under color of law, threatened malicious prosecution on a fictitious charge of grand theft because Ms. Gibson refused to resign her employment, was then denied a pre-termination *Loudermill* hearing, failed to provide compensation during temporary leave status, refused to pay wages owed her, and took her property right of employment without due process of law.

The district court (*Appendix 35*) not only dismissed Ms. Gibson's action, but did so **with prejudice**, asserting the statute of limitations expired February 15, 2002, two years after the Hearing Officer's decision. Ms. Gibson objected (*Appendix 34*), and the lower court overruled the objection

(*Appendix 33*). Appeal was taken to the Idaho Supreme Court under Docket No. 29694, and relief was denied.

REASONS FOR GRANTING PETITION

Docket No. 30976 – Wrongful Termination And Denial Of Due Process

Ms. Gibson was never provided a pre-termination hearing required under *Loudermill*, but Idaho's Supreme Court insists "Gibson was given a pre-termination hearing by way of the hearing conducted on February 15, 2000" (*Appendix 1*, p. 16a). Ms. Gibson was never provided a "pre-termination" procedure, and the February 15, 2000 "hearing" (actually January 25th & 26th, 2000), occurred after she was terminated December 27, 1999. The U.S. Supreme Court in *Loudermill* held that although an employee had a "constitutionally adequate" post-termination hearing, it did not remedy a **constitutionally inadequate** pre-termination hearing. Post-termination hearings, no matter how elaborate, do not relieve the employer of providing the pre-termination procedural protections noted in *Loudermill*. *See McNulty v. Sandoval County*, No. CIV 05-221 BB/ACT, United States District Court, D. New Mexico, August 15, 2005.

The 9th Circuit Court of Appeals certified questions concerning firing and merit systems and addressed that in the matter of *Hansen v. White*, 947 F.2d 1378. The Idaho Supreme Court in *Hansen v. White*, 114 Idaho 907, 762 P.2d 820 (1988), addressed the subject when an elected sheriff may terminate a deputy, after county commissioners enact a merit system that protects classified employees.

Hansen (114 Idaho 907) stated (at page 911):

> "The board of county commissioners has the statutory authority to create a reasonable county merit system, and such an act is a valid legislative exercise of its express power to promote the general welfare of the county".

"Thus, once a deputy attains "permanent" status under the merit system, the deputy is no longer an employee "at will." Consequently, the sheriff's implied power to terminate employees without cause, which arises from the common law, not the constitution, is superceded by the merit system." (at page 913). (Emphasis added).

Under a merit system (pursuant to *Idaho Code*, § 31-714) (*Appendix E*), a classified employee can be terminated only for "good cause", and must have a right to procedural due process, equal protection and judicial review of that property right.

The Idaho Supreme Court acknowledged Ms Gibson was a tenured employee, terminable only for cause (*Appendix 1*, p. 3a & *Appendix 38*, p. 219a), yet denying her due process; she was treated as if she were an "at-will" employee.

Historically, Idaho courts determined, unless review and appeal is allowed to a court, "due process has not been satisfied and is denied." *See State v. Finch*, 79 Idaho 275, 315 P.2d 529 (1957); *Foster v. Walus*, 81 Idaho 452, 347 P.2d 120 (1959); and *Graves v. Cogswell*, 97 Idaho 716, 552 P.2d 224 (1976).

As Idaho before noted in *Finch*, *supra*:

"It should always be kept in mind that the evil of administrative action which must be guarded against is not the fact-finding power, but the conclusiveness of the fact-finding power coupled with the order based on the findings made which would deprive a person of property rights". (Emphasis added).

As Idaho before noted in *Foster*, supra:

"administrative decisions cannot be vested with such finality as to deny to the judicial department its power to afford protection of vested property and constitutional rights." (*Foster*, *Id.* at p. 458). (Emphasis added).

"Where either constitutional or vested property rights are involved the judicial department of the government

must afford a remedy for the protection of such rights". (*Foster*, *Id*, at p. 458). (Emphasis added).

"Where constitutionally protected rights of person or property are dependent upon a judicial review of findings of fact made by an administrative tribunal, that review must be had in a court having the facilities as well as the authority to re-examine the facts and make its own findings, when necessary to the preservation of such rights." *Foster*, *Id* at 458; *see also Finch*, supra, at p. 458. (Emphasis added).

No finality can be given to an administrative agency, let alone bestowed on an elected official, where constitutional rights are involved. There must be a right to adequate judicial review, to address due process as stated before in *Finch*, supra; *Foster*, supra; *State v. Concrete Processors, Inc.*, 85 Idaho 277, 379 P.2d 89 (1963); and *Electors of Big Butte Area v. State Board of Ed.*, 78 Idaho 602, 308 P.2d 225 (1957).

Gibson filed her Petition for Certiorari to the Idaho Supreme Court (*Appendix 4 & 5*), commensurate with recent decisions of the federal court. *See McNulty* supra, and *Terlecky v. City of Ruidoso Downs*, No. CIV 04-1121 BB DJS, United States District Court, D. New Mexico, January 24, 2006. The federal courts stated:

"The personnel manual allows an appeal to state district court from decisions of the City Council, although there does not appear to be statutory authorization for such an appeal in the applicable New Mexico statutes". *Terleckey*, p. 4-5.

"It is true that Plaintiff had a remedy available in district court, by way of writ of certiorari, even if there is no statutory authorization for the direct appeal allowed by the City's personnel manual. *See Zamora v. Village of Ruidoso Down*, 907 P.2d 182, 184 (N.M. 1995)". *Terleckey*, p. 7. See also *McNulty*, footnote 5.

"Unless otherwise provided by statute, the correct procedure to appeal a personnel board's administrative decision is to petition the district court for a writ of certiorari". *Zamora*, p. 184.

If a state court refuses an adequate remedy for this due process deprivation, a Federal court will determine whether the Due Process Clause requires a remedy, and will remedy the violation. *See Hicks v. Jackson County Commission*, Civil Action No. CV-03-S-2858-NE, United States District Court, N.D. Alabama, Northeastern Division, June 23, 2005; *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).

In keeping with the "last overt act" theory, in *McKinney v.Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (quoting *Zinermon v.Burch*, 494 U.S. 113, 126, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990)), the court stated:

"[O]nly when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." *Id*". *See also Horton v. Bd. Cnty. Com'rs, Flager Cnty*, 202 F.3d 1297 (11th Cir. 2000).

Sheriff Killeen perceived his idea of "good cause" to terminate because Ms. Gibson refused to resign. There were no established standards placing any accounting responsibilities on the employee. To do so would violate FLSA. The Sheriff wanted to ignore the violations of FLSA. Sheriff Killeen terminated Ms. Gibson in retaliation for her refusal to resign, rather than address the Payroll errors, and focus on the need to correct FLSA violations.

Historically, Idaho held "good cause" requires a substantial reason related to **work performance**, and it may not be arbitrary, frivolous, unlawful, or a non-established, vague standard, or lack of announced standards or irrelevant claims to terminate. A classified and tenured employee may not be dismissed for conduct **unrelated** to the **performance** of their **job** or the **welfare of the institution by which he is**

employed. *See Allen v. Lewis-Clark State College*, 105 Idaho 447, 670 P.2d 854 (1983).

By not articulating standards of conduct within § 1-7G-3A, A.C.C. (*Appendix A*, p. 346a-350a), or within § 9.04 of the Policy Manual, there can be no consequence to the employee for payroll overpayments, when unrelated to the employee's job performance. Undefined, undisclosed standards are not enforceable, and payroll errors could not be transferred or delegated, in any event. The employee must be apprised of conduct required before held accountable. Termination without standards or review leaves the termination arbitrary, capricious and unlawful. As Idaho before held, standards are critical to procedural due process. As in *H & V Engineering v. Bd. of Pro. Engineers*, 113 Idaho 646, 747 P.2d 55 (1987) and Tuma v. Board of Nursing, 100 Idaho 74, 593 P.2d 711 (1979), Idaho courts used to historically recognize:

> "The right to practice a chosen profession is a valuable property right which cannot be deprived unless one is provided with the safeguards of due process. *Schware v. Board of Bar Examiners,* 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) (lawyer); *Tuma v. Board of Nursing,* 100 Idaho 74, 593 P.2d 711 (1979) (nurse); *Ferguson v. Board of Trustees of Bonner County School Dist. No. 82,* 98 Idaho 359, 564 P.2d 971 (1977) (teacher)".
>
> The void-for-vagueness doctrine was before defined in Idaho in *Wyckoff v. Board of County Commissioners of Ada County,* 101 Idaho 12, 15, 607 P.2d 1066, 1069 (1980):
>
> "[A] statute is unconstitutionally vague when its language does not convey sufficiently definite warnings as to the proscribed conduct, and its language is such that men [or women] of common intelligence must necessarily guess at its meaning". (Emphasis added).

Ms. Gibson was terminated without a *Loudermill* hearing, fired, and denied due process for something Payroll did; the Sheriff had not proscribed conduct, definition, or identifiable standard; and balancing a personal account was never part of her job performance or work duty.

Non-permissible reasons to terminate employment will never be sustained by a court's review of employee rights. *See Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977) and *Allen*, supra.

When a conflict exists about the discharge of an employee for "good cause", the employee is entitled to access the courts and judicial review from any administrative process, and the employer bears the burden of proving the existence of "good cause". *See Hansen v. White*, 947 F.2d 1378 (9th Cir. 1991). When the employee demonstrates the termination was in violation of an employment contract, or protected property rights, the employer bears the burden to prove the existence of good cause for any termination. *Lucas v. Whittaker Corp.*, 470 F.2d 326 (10th Cir. 1972).

Because of litigation with *Gibson,* and with *Woodbridge, Perkins, Gallagher, and Knickerbocker* (each referred to in this Petition), the Commissioners have **now** enacted Ordinance No. 612, amending § 1-7G-3 of the Personnel System (*Appendix C*), to allow termination by an **elected** department official to be **final**, eliminating a classified employee's right to agency review, or access a court for judicial review of the termination imposed, as proceedings cannot come through the *Idaho Administrative Procedures Act* without agency action, a prerequisite for judicial review.

In Idaho, the elected official (Sheriff) is empowered by the board of county commissioners through Article 18, § 6, Idaho Constitution, to **appoint** deputies as the business of their office may require (*Appendix D*). The County has taken the position the right of an elected official to "appoint" deputies goes "hand-in-hand" with the right to

"terminate", contrary to *Hansen v. White*, 947 F.2d 1378 (9th Cir. 1991). In a recent matter of *Clark v. O'Malley, et al.*, Case No. 276, filed June 30, 2006, the Court of Special Appeals of Maryland, held an official empowered to remove a public employee may do so only in accordance with constitutional and statutory provisions providing for removal, and may only be exercised in strict compliance with procedural and substantive provisions.

Docket No. 31553 – Denial of Statutory Right of Action Under Fair Labor Standards Act, § 29 U.S.C. § 216(b)

Sheriff Killeen brought Ms. Gibson into a proceeding under the *Fair Labor Standards Act* when classifying her "7k" exempt, and then into a confrontational proceeding when directing detectives interrogate her, as a result of the County's violations of FLSA, § 211(c), wage record-keeping errors, utilizing incompetent and flawed computer system, and ongoing violations of FLSA, § 207(k), for misuse of the "7k exemption", causing overtime errors.

Protection and right of action was established in Public Law 99-150, Sec. 8, Nov. 13, 1985, 99 Stat. 791, which provided a public agency which "discriminates or has discriminated against an employee with respect to the employee's wages or other terms or conditions of employment because the employee asserted coverage under section 7 of the *Fair Labor Standards Act* (29 U.S.C. § 207), shall be held to have violated section 15(a)(3) of such Act (29 U.S.C. § 215(a)(3)". The protection afforded became available August 1, 1986, for actions described in section 15(a)(3) of the FLSA.

Ada County and its Sheriff continued "7k" violations and attempted retaliatory transfer of accounting responsibility by use of a "pay voucher" containing a waiver, in violation of their duty to keep and maintain accurate wage records under § 211(c) and correct application of § 207(k), throughout all

duration of Ms. Gibson's employment. These violations constitute independent violations of the *Fair Labor Standards Act*, § 215(a)(2), § 215(a)(3), and § 215(a)(5).

The "accurate record-keeping" duty is placed **solely** upon the employer, and any attempt to transfer that responsibility remains the employer's peril. *See Goldberg v Cockrell*, 303 F2d 811 (CA5 Miss., 1962). *See also* Title 29, U.S.C. § 211; Fact Sheet No. 021, U.S. Department of Labor, Wage and Hour Division, and Code of Federal Regulations, Title 29, §§ 516.1 and 516.2.

The employer **cannot** transfer this statutory obligation under § 211(c), to the employee **for any reason**. *See Caserta v Home Lines Agency, Inc.*, 273 F2d 943 (CA2 NY, 1959). The responsibilities imposed by § 211(c) belong solely to the employer, and cannot escape responsibility with efforts to delegate that record-keeping to the employee. *See Wirtz v Mississippi Publishers Corp.*, 364 F2d 603(CA5 Miss., 1966); *Andrews v Montgomery Ward & Co.*, 30 F Supp 380 (DC Ill., 1939), and *Walling v Sun Pub. Co.*, 47 F Supp 180 (DC Tenn., 1942); *Hodgson v General Motors Acceptance Corp.*, 347 F Supp 9 (DC Fla., 1972), affd (CA 5 Fla) 482 F2d 825.

Ada County was non-compliant with FLSA, long before Ms. Gibson became employed, confirmed by former County Commissioner, Sharon M. Ullman (*Appendix 39*), where she referred to the County's letter (*Appendix 41*), that included doing nothing about it.

As concerns were mounting over FLSA violations, the County began a "new payroll system" December 16, 2001 and the Sheriff advised employees wage calculations (still) "will not be accurate" (*Appendix 40*) The concept of the "pay voucher endorsement" was abandoned. This change became effective *circa* January 10, 2002. The "pay voucher" prior to January 10, 2002, violated FLSA, as the voucher was designed for use as a "waiver", if "errors" were not brought to the

attention of Payroll within five (5) days after an employee placed signature on the document. *See Appendix 1*, p. 3a & *Appendix 38*, p. 219a.

This FLSA violation existed in 1994, identified in *Ken Woodbridge and Bob Perkins v County of Ada*, Case No. 95957, Fourth District Court, Ada County. The court found Ada County violated FLSA.

After Ms. Gibson was terminated, Ralph Gallagher initiated litigation against Ada County March 15, 2002, because of ongoing violations of FLSA, § 207(k), and challenged retaliatory termination of his employment. *See Gallagher v. Ada County et al*, 4th DC, Case No. CVOC 0202022D (*Appendix 17*, p. 98a). Ada County settled with Mr. Gallagher out of court and paid $70,000.00 because of their misconduct.

On March 2, 2004, the Commissioners met to discuss wrongful classification of Jail Technicians under § 207(k), and allocated funds to reimburse Jail Technicians.

On June 1, 2004, Ada County gave $52,593.17 to 64 individuals employed as Jail Technicians. *See Knickerbocker, et al, v. Ada County, Idaho*, Case No. CV 04-288-S-BLW, U.S. District Court, District of Idaho, Answer to Interrogatory No. 12 & No. 13, Docket No. 21-5, p. 7-8, filed February 11, 2005 (*Appendix 58, 59, 60, 61, 62, 63 & 64*). These Jail Technicians were sent a check and letter (*Appendix 58*), accompanied by a "release" and "waiver" form, seeking to preclude them from utilizing their FLSA "right of action" to pursue sanctions, liquidated damages, costs and fees, under the FLSA (*Appendix 69 & 70*). Such waivers are against public policy, *null and void.* Once this information became known to Ms. Gibson, she requested pay in an equitable manner for the County's violation of FLSA § 207(k) (*Appendix71*). Receiving no response, a letter was sent to legal counsel for Ada County, Ray J. Chacko (*Appendix 72*).

Three Jail Technicians filed suit against the County in federal court for intentionally classifying them exempt under FLSA § 207(k). *See Knickerbocker, et al, v. Ada County, Idaho*, Case No. CV 04-288-S-BLW, U.S. District Court, District of Idaho (*Appendix 58, 59, 60, 61, 62, 63 & 64*). During discovery, Ada County confirmed jail technicians were classified exempt sometime between 1993 to 1995. *See Knickerbocker, et al, v. Ada County, Idaho*, Answer to Interrogatory No. 3, Docket No. 21-5, p. 3, filed February 11, 2005 (*Appendix 60*). Statement of Relevant Facts (Document No. 56, p. 3-5) in *Knickerbocker, et al, v. Ada County, Idaho*, Case No. CV 04-288-S-BLW, U.S. District Court, District of Idaho, filed March 13, 2006.

The court certified class-action status (*Appendix 58*) for prospective plaintiffs as a collective action under FLSA § 216(b), due to the County's **willful** violation of § 207(k), and allowed back pay, liquidated damages and interest for three years, due to the ongoing willful violation.

The affidavits of Kelli Bolicek and Cheryl Bower (*Appendix 65, 66 & 68*), made no mention of wages due Ms. Gibson for wrongful exemption under § 207(k). In *Knickerbocker*, when the County was asked to identify all persons who participated "to compensate these law enforcement personnel as if they had worked on a forty (40) hour per week schedule", Kelli Bolicek was listed in subparagraph "b", Vaughn Killen was listed in subparagraph "g", and the Board was listed in subparagraphs "h", "i" and "j" (*Appendix 61*). *See also Appendix 58, 59, 60, 62, 63 & 64*.

The County's complaint of November 7, 2001 alleged Ms. Gibson owed the County $8,528.89, even though the County knew it owed back compensation to her for § 211(c) and § 207(k) violations, as was addressed in Count I, II, III and IV of Ms. Gibson's amended counterclaim (*Appendix 73*, p. 500a-509a) that was dismissed (*Appendix 19*).

Ada County may not maintain an inefficient accounting procedure and claim no responsibility due to incompetent system(s). *See Dominici v Board of Education of the City of Chicago*, 881 F Supp. 315, p. 315, 316 and 320 (N.D. Ill. 1995).

Ms. Gibson has never waived her right of action, as the law on waiver was settled in *Brooklyn Bank v. O'Neil*, 324 U.S. 697, p. 697 and 705 (1945). The United States Supreme Court addressed FLSA and ruled the employee's inability to waive rights:

> "An employee's *release* and *waiver* of *rights* to minimum wages and liquidated damages under the Fair Labor Standards Act, in consideration of a sum known by both employer and employee to be less than statutory minimum wages due, is *void*", and;
>
> "a *statutory right* conferred on a private party, but affecting the public interest, *may not* be *waived* or *released* if such waiver or release contravenes the statutory policy". (Emphasis added).

Docket No. 29694 – Violation Of Petitioner's Civil Rights Under 42 U.S.C. § 1983

During the earlier dispute of *Gibson v. Ada County*, 138 Idaho 787, 69 P.3d 1048 (2003), concerning Ada County's refusal to provide Ms. Gibson public records pursuant to the *Idaho Public Records Act*, *Idaho Code*, § 9-337 *et seq.* (concerning employment matters), during appellate oral argument (December 11, 2002), the court asked about the Sheriff's criminal investigation concerning Ms. Gibson, and counsel for Ada County stated:

> ".....the statute of limitations would still not have run. Additional information found currently may still create an ongoing situation for that file.....", and "the statute of limitations had not run, and charges still could have been

filed had the discovery of further information made that appropriate" (continuing threat of prosecution).

In *Thompson v. City of Shasta Lake*, No. Civ. S-03-2513 LKK/KJM, April 28, 2004 (E.D. Cal. 2004), a Title 42 U.S.C. § 1983 case, the court stated (at page 12):

> "Under federal law, a cause of action generally accrues when the plaintiff "knows or has reason to know of the injury which is the basis of the action".
>
> "In this Circuit (9th Cir.), ...the statute of limitations does not accrue until the criminal charges against the plaintiff seeking to bring the § 1983 action are resolved". *See also Heck v. Humphrey*, 512 U.S. 477 (1994), and cited in *Thompson v. City of Shasta Lake*, supra.

In *Pounds v. Denison*, 115 Idaho 381, 384, 766 P.2d 1262, 1264 p. 383-384 (1988) the Idaho court before held:

> "We deem it equally true that the *procedures* of the *Act must be followed* to *exhaust the administrative remedies* offered before a *classified employee may sue upon a claim pertaining to his employment*."
>
> "Where an administrative remedy is provided by statute, *relief must* be *sought* from the *administrative body* and *this remedy exhausted before the courts will act*. Absent a statutory exception, the exhaustion of an *administrative remedy* is a *prerequisite* for resort to the courts."

Only once Ms. Gibson could demonstrate a final **agency** order of termination, could she have injury and accrued claim against Ada County for permanent injuries inflicted upon her, and permanently deprived of her property rights encompassed by the Fourteenth Amendment protection announced in *Board of Regents vs. Roth*, 408 U.S. 564, 569 (1972). A Title 42 claim generally accrues when a person knows or has reason to know the actual injury attributable to the "last overt act" forming the basis of the claim. If no pre-termination hearings, no agency hearings and no right to

judicial review, the statute of limitations should not commence, as the termination is not from an agency order, and no denial of an agency review was announced until July 2, 2003 (*Appendix 37*), when the Board of Commissioners **refused** to provide Ms. Gibson a **due process administrative review hearing**, after the other established due process format had been rendered "infirm" by the Idaho Supreme Court. If the agency refuses to establish a valid review process, or refuses to conduct an administrative hearing to comply with the mandated due process requirements, the available avenues contemplated cannot be exhausted.

The termination must become administratively final. *See Hoesterey vs. City of Cathedral City*, 945 F.2d 317 (9th Cir. 1991). *See also McCoy vs. San Francisco, City & County*, 14 F.3d 28 (9th Cir. 1994), and *Hill vs. State of Tenn.*, 868 F. Supp. 221 (1994). Ms. Gibson's termination could not become final until an administrative process by the agency has run its course

> Again, in keeping with the "last overt act" theory, in *McKinney v.Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (quoting *Zinermon v.Burch*, 494 U.S. 113, 126, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990)), the court stated:
>
> "[O]nly when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." *Id*". *See also Horton v. Bd. Cnty. Com'rs, Flager Cnty*, 202 F.3d 1297 (11th Cir. 2000).

The Personnel System (Merit System), § 1-7-1 through § 1-7L-10, A.C.C., conferred upon Ms. Gibson a legitimate entitlement and benefit of a property right in employment, wages, and benefits owed her (*Appendix A*). Once she attained classified tenured employee status, she had the right to continued employment and compensation for wages and benefits owed, and an unqualified right to procedural due

process concerning **all** property rights. Ada County, and our Idaho courts, have taken what can only be seen as a strong pro-employer position, raising concern as to their regard for these federal enactments. They seek to deprive Ms. Gibson's rights, expectations of continued employment, wage and benefits, and procedural due process, now hindered entirely under color of law. *See Pappas v. City of Lebanon*, 331 F. Supp. 2d 311~~; August 16~~, 2004 (M.D. Pa. 2004).

The anti-retaliation provisions of FLSA prohibit Ada County from interfering with Ms. Gibson's "unfettered access" to the remedial mechanisms to which she is entitled under FLSA, and intended to deter County conduct of discriminating, retaliating and interfering with her efforts to advance enforcement under FLSA. The provisions are not confined to harm related to Ms. Gibson's employment, or actions that occurred strictly at the workplace. *See Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. ___ (2006). As in *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (CA10 1996), Ada County committed actionable retaliation when threatening prosecution for grand theft if Ms. Gibson did not resign, and requesting false criminal charges be filed against her. That materially adverse treatment was based on a retaliatory motive of the Sheriff, in a fashion reasonably likely to deter Ms. Gibson from engaging in protected FLSA activity, and seeking to gain her voluntary resignation of her employment career.

Ms. Gibson had been unemployed for over one year following the County's conduct, and suffers a severe and permanent PTSD condition as a result of this "adverse employment action" pursued by County officials. *See Burlington Northern & Santa Fe Railway Co. v. White*, supra. Such harm and damage caused by Ada County was not confined to Ms. Gibson's related County employment or damage suffered at the workplace. Ada County cannot avoid liability in this circumstance, as Ms. Gibson has been

victimized, and entitled to recover damages to compensate her.

CONCLUSION

On July 11, 2006 the U.S. Court of Appeals for the District of Columbia Circuit in the Indian Trust Fund (*Cobell, et al. v. Kempthorne, et al.*, Case No. 05-5269), held (p. 15):

> "This case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few. It reminds us that even today our great democratic enterprise remains unfinished. And it reminds us, finally, that the terrible power of government, and the frailty of the restraints on the exercise of that power, are never revealed until government turns against the people."

In the Annual County Benefit Survey, April 2006, the Idaho Association of Counties (IAC) confirmed Ada County is a public employer of 1,345 full-time employees. If Ada County is allowed to continue retaliation, discrimination, and denial, despite FLSA as they have done against Ms. Gibson, those 1,345 County employees will be at the mercy of a governmental agency that has a history of FLSA violations..

Based upon the facts presented, Petitioner requests this Court grant her Petition For Writ Of Certiorari on all issues presented.

Respectfully submitted,

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